

Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases

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I. Introduction

Duress occurs when one person (the defendant) brings improper pressure to bear on another (the plaintiff) to make them agree to do something. The pressure may take the form of a threat to do some act or the doing of the act itself. This paper is concerned with the application of the doctrine of duress to set aside contracts. In particular, it considers what I call the 'contractual variation situation'. This is where the plaintiff claims that they agreed to a variation of an existing contract with the defendant under duress and the plaintiff seeks to have the variation set aside. Typically the claim involves the defendant's use of economic pressure, in particular the threat not to perform the original contract, to 'encourage' the plaintiff to agree to the variation.

The potential application of the doctrine of duress to economic pressures generally and to the exercise of pressure in the contractual variation situation gained prominence in the mid 1970s with cases such as *The 'Siboen' and the 'Sibotre'*.¹ Since then a number of key cases² and associated academic commentary³ have encouraged debate and the doctrine of duress is now recognised as an important factor in determining the validity of contractual variations.⁴

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¹ *Occidental Worldwide Investment Corp v Skibs A/s Avanti* [1976] 1 Lloyd's Rep 293.

² These include *Pao On v Lau Yiu Long* [1980] AC 614; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* (The 'Universe Sentinel') [1983] 1 AC 366; *Dimskal Shipping Co SA v International Transport Workers Federation* (The 'Evia Luck') [1992] 2 AC 152; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714; *Pharmacy Care Systems Ltd v Attorney-General* CA198/03, 16 August 2004; *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463.

³ These include: M H Ogilvie "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 McGill LJ 289; J Beatson "Duress, Restitution, and Contract Renegotiation" in J Beatson *The Use and Abuse of Unjust Enrichment* (Oxford, 1991) 95 ("Beatson, Duress"); A Phang "Economic Duress – Uncertainty Confirmed" (1992) 5 JCL 147; S Smith "Contracting Under Pressure: A Theory of Duress" (1997) 56 CLJ 343; R Bigwood *Exploitative Contracts* (Oxford, 2003). There is also some important earlier commentary, including: J Dawson "Economic Duress – An Essay in Perspective" (1947) 45 Michigan LR 253; R Sutton "Duress by Threatened Breach of Contract" (1974) 20 McGill LJ 254.

⁴ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1; *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 (CA).

Despite the importance of the doctrine, it is unclear just what the plaintiff must establish to be freed from the ordinary legal consequences of entering into a contract. A cause of this is that, apart from the results in individual cases, English and New Zealand courts have chosen to provide guidance at a high level of generality through statements of principle as to what constitutes duress.

Adding to the uncertainty, in purporting to apply the principle, some courts have added reservations and qualifications as to its application. We are told, for example, that the principle refers to the “minimum ingredients”⁵ for relief; that it does not provide a “precise analytic tool”;⁶ and that a finding of duress depends on the case’s “distinctive features”.⁷ Indeed, the reasoning in many judgments appear to be conclusory, by which I mean that the court appears to prefer to state a result rather than to explain why that result is required by the principle.⁸

The aim of this paper is to help bridge the gap between the general principle and the results in particular cases, thereby providing more certainty in the application of the law. Indeed the case law reveals an intermediary layer of analysis between the general principle and the results in particular cases, which indicates that the application of the doctrine of duress in a particular case depends on the court’s evaluation of five distinct, yet intertwined, enquiries. These are:

1. whether the pressure can be described as “improper” in those circumstances;
2. whether there is a prior relationship between the plaintiff and the defendant;
3. whether the defendant’s motivation in exerting the pressure can be described as ‘improper’ in the circumstances;
4. whether the outcome is inappropriate, either because the contract should not have been procured by these means or is intrinsically unfair; and
5. whether the plaintiff felt sufficiently pressured to enter into a contract which he or she might not otherwise have entered into.

The enquiries may differ in the guidance they provide. Where this occurs the courts are required to adopt a balancing exercise.

A consideration of the five enquiries comprising this intermediary layer of analysis provides more meaningful guidance in determining and then analysing the ‘distinctive features’ of a particular fact situation than that

⁵ *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd’s Rep 620 at 637 per Mance J.

⁶ *Adam Opel GmbH v Mitras Automotove UK Ltd* [2007] EWHC 3252; [2008] CILL 2561 at [26].

⁷ *CTN Cash and Carry Ltd v Gallaher Ltd* above n 2, at 717 per Steyn LJ; *Huyton SA v Peter Cremer GmbH & Co* above n 5.

⁸ This is illustrated by the Court’s use of the factors specified in *Pao On v Lau Yiu Long*, above n 2. See text to notes 135-136 and 143-144.

offered by the general principle. It also provides a framework against which specific considerations in individual cases can be generalised.

As a background to a consideration of these five enquiries, the statement of principle as to what constitutes duress is considered in the next part (Part II). The material in this part includes a consideration of the factors that have encouraged the development of a general principle.

Building upon this, the material in Part III considers individual cases to reveal the intermediary layer of analysis and the five enquiries noted above. In revealing this intermediary layer of analysis and considering the application of each of the factors (and their inter-relationship) the paper's emphasis is upon New Zealand cases but reference is also made to key English⁹ and commonwealth cases.

II. The Development of General Statements of Principle

1. Background

Agreements to vary existing contracts present competing policy concerns. On the one hand, sanctity of contract and associated concerns suggest that contractual variation should be discouraged. Alternatively, freedom of contract and economic efficiency suggest the opposite.

An early response to these concerns was the pre-existing duty rule.¹⁰ In hindsight this rule was a blunt response, in that it required new consideration by the defendant rather than evaluating the pressure exerted by defendant seeking the contractual variation.¹¹ But until recently this response was seen as appropriate. Moreover this situation was not seen as coming within the scope of the doctrine of duress. Its concern was seen as being largely with contracts entered into and money obtained as a result of actual violence or the threat of violence, and money obtained as a result of either improper application of the legal process or the duress of goods.¹²

More recently the operation of the pre-existing duty rule has been relaxed.¹³ The courts have also recognised a wide range of economic pressures that may be improper and, when they result in the plaintiff entering into a contract, may constitute duress. Moreover, the recognition of 'economic' duress (and 'lawful-act' duress, if it is different) has

⁹ The New Zealand position is very similar to the English law, see *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA) at [32] per Tipping J.

¹⁰ Attributed to *Stilk v Myrick* (1809) 2 Camp 317; 170 ER 1168, this rule excluded as a "consideration" a subsequent promise to do an act which the promisor was already contractually bound to the promisee to perform.

¹¹ Beatson, *Duress*, above n3.

¹² *Ibid.*

¹³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* above n 4; *Antons Trawling Co Ltd v Smith* above n 4, at [89]-[93]; *Adam Opel GmbH v Mitras Automotove* above n 6, at [42]; compare *South Caribbean Trading Ltd v Trafihura Beheer BV* [2004] EWHC 2676; [2005] 1 Lloyd's Rep 128 at [107]-[109].

required courts to incorporate this type of duress within the wider doctrine of duress. The current statements of general principle have been the response. To these we now turn.

2. The General Principle

The impact of the recognition of economic duress for our understanding of the doctrine of duress should not be under-estimated. As a starting point, this recognition raised the question whether the doctrine is plaintiff-focused (upon the quality of the plaintiff's assent to the contract) or defendant-focused (upon the quality of the defendant's conduct in pressuring the plaintiff). The (now) orthodox English and New Zealand two-limb formulation of the general principle reflects this tension. It refers to both a defendant-focused consideration (the defendant's pressure must be "regarded in law as illegitimate") and a plaintiff-focused consideration (did the defendant's illegitimate pressure bring "about an absence of practical choice" for the plaintiff).¹⁴ In turn, two features are said to determine whether the pressure is illegitimate. These are the nature of the pressure exerted by the defendant and the nature of the defendant's demand. The general principle applies to all types of duress.

Care should be taken with the general principle, for its phrases are not "terms of art". Some courts express the underlying concerns differently. So, for example, some courts and commentators use the adjective "improper" in preference to "illegitimate" to describe the adverse nature of the offending pressure.¹⁵ An advantage in preferring "improper" over "illegitimate" is that it may more clearly convey the message that an important consideration is the defendant's motivation for the use of the pressure. For that reason the word "improper" is preferred in this paper. Some courts also reorientate the second limb by enquiring whether the

¹⁴ These phrases are taken from the judgment of Tipping J in *Attorney-General for England and Wales v R* above n 9. In turn they are derived from the speech of Lord Scarman (and to some extent Lord Diplock) in *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, which had received the approval of their Lordships in *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152. This approach subsequently received the approval of the Privy Council in *Attorney-General for England and Wales v R* [2003] UKPC 22; [2004] 2 NZLR 577 at [15]-[16], which in turn was regarded as settling the law in New Zealand, see *Pharmacy Care Systems Ltd v Attorney-General* (2004) 17 PRNZ 308 (SC) at [2]. An earlier formulation suggested that that the pressure must be such so as to overbear the plaintiff's will thereby vitiating their consent to the contract, see *Pao On v Lau Yiu Long* above n 2, but despite its use in *Pharmacy Care Systems Ltd v Attorney-General*, its use has been discouraged, as being "apt to mislead", see *McIntyre v Nemesis DBK Ltd* 329; [2010] 1 NZLR 463 at [64] per O'Regan J.

¹⁵ *Pharmacy Care Systems Ltd v Attorney-General* above n 2, at [98]; *McIntyre v Nemesis DBK Ltd* above n 2, at [19]; P Atiyah "Duress and the Overborne Will Again" (1983) 99 LQR 353 ("Atiyah").

pressure was “a significant cause” of the plaintiff’s agreement.¹⁶

Another reason for taking care with the general principle is that while it refers to discrete requirements, the courts do not regard it as a code. This leads to variations in approach. So, for example, some courts stress that the two major strands in the principle – improper pressure and absence of practical choice – are linked and require them to conduct an overall assessment of the parties’ behaviour.¹⁷ Depending upon the particular circumstances before them, however, other courts emphasise different aspects of the principle.¹⁸

The requirements of “improper pressure” and “absence of practical choice” are, in turn, a product of two considerations which the courts view as being particularly important in shaping the doctrine of duress. First, there is the difficulty of determining what pressures should attract judicial censure. Underlying this is the question “what are the ‘permissible limits of coercion in our society’?”¹⁹ The second difficulty is one of determining whether the pressure was causative of the plaintiff’s decision to do the sought-after act. These difficulties are considered briefly now so as to enable a better appreciation of some of the nuances in the general principle.

3. A Reason for the Development of a General Principle – Difficulties in Determining When Economic Pressure is Improper

The doctrine of duress is not concerned with the use of pressure per se. Pressure is a part of everyday life.²⁰ Rather, the doctrine is concerned with the use of pressure that the law regards as improper. The adjective “improper” provides a label under which to marshal the judicial considerations which determine if the particular use of pressure in a certain fact situation is to be sanctioned or not.

¹⁶ See *Huyton SA v Peter Cremer GmbH & Co* above n 5, 636 (Mance J); *PAC Limited v Hamilton Heritage Limited* CA, 20 March 1996, Hirst, Peter Gibson and Ward LJ (Transcript: John Larking; available on Lexis, last accessed October 2009); *DSND Subsea Ltd v Petroleum Geo Services ASA* [2000] BLR 530, at [131]; *Carillion Construction Limited v Felix (UK) Limited* [2001] BLR 1, at [24].

¹⁷ *Attorney-General for England and Wales v R* above n 9, at [62]; *Adam Opel GmbH v Mitras Automotove UK Ltd* above n 6, at [26].

¹⁸ Some courts, for example, appear to focus on whether the plaintiff has any practical choice and, in so doing, rely upon the factors discussed in *Pao On v Lau Yiu Long* above n 2. See text to notes 135-136 and 143-144. In a similar vein, recent cases, such as *McIntyre v Nemesis DBK Ltd* above n 2, indicate that the courts consider the totality of the evidence to determine if there has been an affirmation of the contract.

¹⁹ Atiyah, above note 15, at 356. See *Pharmacy Care Systems Ltd v Attorney-General* above n 2, at [96] and *McIntyre v Nemesis DBK Ltd* above n 2, at [67].

²⁰ *Attorney-General for England and Wales v R* above n 9, at [62] per Tipping J (“The starting point must be that the law recognises people generally act under some degree of pressure in making decisions affecting their commercial and other interests”).

A starting point: the traditional pressures

Prior to the recognition that economic pressures may be used improperly, it was comparatively easy to determine whether the use of a pressure was improper. Traditionally the law recognised types of improper pressure.²¹ These included acts of personal violence or threats thereof, improper application of the legal process, duress of goods, and refusal to provide certain goods or services except on certain terms.

The most straightforward type of pressure to evaluate was (and remains) the use of, or threatened use of, violence. This is because this pressure contravenes the criminal law, which in turn, provides an external reference point of unacceptable behaviour.²² The finding of duress appears to be largely consequential upon that.

While not as straightforward the other traditional forms of improper pressure such as duress of goods, also make use of an external reference point – commonly the law of torts – to assist in the evaluation process. Significantly these pressures reveal that their evaluation may involve a delicate balancing act. This is because their external reference point is less absolute, in that the circumstances in which the pressure is exerted plays a prominent role in determining whether the defendant's actions are seen as contravening the general law of the land. This is illustrated of the approach of the courts with respect to duress of goods.²³

Typically, whether a defendant's threat – to withhold return of the plaintiff's property (followed by the actual refusal to do so) unless the plaintiff pays a sum of money or promises to do so²⁴ – is improper, depends on whether the refusal constitutes an act of conversion. This in turn depends on whether the plaintiff has the immediate right to possess the goods. In straightforward cases, where the transfer of possession from the plaintiff to the defendant is not consensual or the defendant

²¹ See generally G Jones (ed) *Goff and Jones, The Law of Restitution*, (7th ed, London, 2007) ("*Goff and Jones*"), at [10-004] – [1010-024].

²² In *Royal Boskalis Westminster NV v Mountain* [1999] QB 674 at 730-732 Phillips LJ confirmed the existence of a distinction between classes of duress depending on whether the act was so "unconscionable" that it would "cause the English court, as a matter of public policy, to override the proper law of the contract". He gave the example of a threat to use people as a human shield.

²³ Another illustration is approach of the courts to determine whether observations surrounding the laying of a complaint of criminal conduct against the plaintiff constitute blackmail and therefore an improper pressure. See text to notes 47-52.

²⁴ *Skeate v Beale* (1841) 11 Ad & El 989, 113 ER 688 suggested that a contract could not be set aside for duress of goods but this approach has been criticised, see *Goff and Jones*, above n 21, at [10-013] – [10-014]; and Beatson, *Duress*, above n 3, at 99-106. In *Mann v Buxton* CA 49/90, 31 July 1990, a contract was set aside, as being obtained through duress of goods.

knows that he or she no longer retains the right to possess the goods,²⁵ the claim of duress should be successful. But goods can be retained in the context of a commercial relationship between the parties and, because of this, the issue whether the defendant is entitled to retain possession of the goods may be unclear.²⁶

Difficulties in evaluating economic pressures

Despite the difficulties associated with evaluating some of the traditional forms of pressure, the task is easier than evaluating economic pressures. This is because the courts have, as a matter of legal policy, already independently concluded that the type of pressure is one which the defendant is not entitled to make, either in any situation (eg, violence) or in some situations (eg, refusal to return goods).

It is much more difficult to determine whether the use of economic pressure is improper.²⁷ Economic pressure can be exerted without contravening the criminal law or committing a tort.²⁸ Moreover, "tough, even ruthless, negotiation which ... may put pressure upon a weaker party to capitulate"²⁹ is a part of everyday commerce; so too is taking advantage of the plaintiff's need and or vulnerabilities.

A defendant's refusal to perform an existing contract illustrates some of these difficulties. First, the refusal may or may not constitute a breach of contract, and only the court may resolve whether it is.³⁰ An added complication is that the defendant may genuinely believe that they were entitled to make the threat.³¹ Second, even if it is a breach of

²⁵ *Astley v Reynolds* (1731) 2 Str 915, 93 ER 939. Pawnbroker seeking a payment greater than the then legal rate of interest. See *Goff and Jones, ibid.*, at [10-011].

²⁶ *Mann v Buxton*, above n 24. There a former business partner retained a certificate of title to land as a security for payment of debts. The Court saw this as a contractual dispute *c.f. Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 299 (NSW CA). There a repairer refused to release an urgently required helicopter unless its owner agreed to release the repairer for any liability for disputed repair work. The Court classified this as a duress of goods case.

²⁷ *Attorney-General for England and Wales v R* above n 9, at [62] per Tipping J ("Illegitimacy of pressure can sometime arise from conduct which is unlawful in itself, albeit it will of course be easier to demonstrate illegitimacy of pressure if it derives from conduct which is unlawful in itself").

²⁸ *Universe Tankships Inc of Monrovia v International Transport Workers Federation* above n 2, at 385 per Lord Diplock.

²⁹ *PAC Limited v Hamilton Heritage Limited* above n 16, per Ward LJ.

³⁰ *B & S Contracts and Design Ltd v Victor Green Publications* [1984] ICR 419 (did *force majeure* clause apply?). For this reason, the observation in *McIntyre v Nemesis DBK Ltd* above n 2, at [31] that the Court would "proceed on the basis that a threat to breach a contract is unlawful and generally illegitimate" begs the question.

³¹ *Carillion Construction Limited v Felix (UK) Limited* [2001] BLR 1 at [37]. The defendant "genuinely (but mistakenly) believed" that it was entitled

contract, the law generally confers upon a contracting party the ability to “deliberate[ly] breach” their contract and pay damages; the exception is when the contract is specifically enforceable.³²

The crucial point is that the evaluation of the pressure requires more than a reference to a standard provided by another branch of the law. Rather the courts must evaluate the pressure against a range of considerations, including the specific context in which it was exerted.

4. Another Reason for the Development of a General Principle – Difficulties in Evaluating the Effect of Economic Pressure

Typically issues of causation raise complex questions irrespective of the legal context in which they arise. In the context of the law of duress, however, the recognition that economic pressures may be improper and that duress may be present in the contractual variation situation introduces a new layer of complexity in evaluating of the causal effect of the pressure upon the plaintiff.

A starting point is the general question – “what is ‘the extent to which society can legitimately require people to stand up to threats when they are made, rather than to submit and litigate afterwards?’”³³ Unique challenges arise in addressing this question in the context of evaluating the effect of pressures directed to “encouraging” a party to enter into a contract or a variation. One challenge involves reaching the right balance between the competing policy concerns of sanctity of contract and protection against contracts entered into by improper pressure. The second is to evaluate the range of influences potentially acting upon the plaintiff.

Balancing sanctity of contract and misuse of pressure

Just as parties can reach binding compromise agreements to disputed claims,³⁴ parties to a contract may vary their contractual obligations. To some degree this ability undermines the idea of sanctity of contract but, alternatively, it strengthens the role of contract as a facilitative device. In any event, the contractual variation attracts legal recognition and protection; sanctity of contract attaches to the variation.

The application of the doctrine of duress in the contractual variation situation has the ability to undermine the re-established sanctity of

to stop performing the contract. *McIntyre v Nemesis DBK Ltd* above n 2, at [54] “Clause 10 envisaged that if the parties agreed to a change, they would resolve a new management practice. It was not inconsistent with the joint venture agreement for [the defendant] ... to initiate a process aimed at agreeing such a change.”

³² *Williams v Roffey Bros & Nicholls (Contractors) Ltd* above n 4. See also Beatson, *Duress*, above n 3, 129.

³³ Atiyah, above n 15, at 356. *Skeate v Beale* above n 24, was seen as precluding plaintiffs from entering into contracts and then raising the issue of duress.

³⁴ *Cook v Wright* (1861) 1 B & S 559; 121 ER 822. See Beatson, “Duress”, above n 3, at 99–103.

contract. A concern is that a plaintiff may misuse the doctrine by choosing to enter into a contractual variation so as to secure the defendant's performance of a key obligation and then resort to the doctrine of duress with the aim of restoring the original contract.

To guard against this risk the second limb of the general principle emphasises the need to ensure that the plaintiff did enter into the variation under duress. To assist in determining this many courts turn to the list of factors identified in *Pao On v Lau Yiu Long*.³⁵ The point is that this limb, supplemented on occasions by a positive finding that plaintiff has affirmed the variation,³⁶ is employed to protect against this risk.

Evaluating the influences operating upon the plaintiff

A plaintiff may agree to a variation for a range of reasons, sometimes conflicting reasons. As a result the courts need to evaluate the plaintiff's response to the defendant's pressure so as to determine its effect. The associated challenges are illustrated by considering the situation where the plaintiff is "asked" to confer some unbargained-for advantage upon the defendant or to relax their obligations.

In this situation there may be positive commercial reasons why the plaintiff agrees to the modification. In essence the plaintiff takes the opportunity presented by the defendant's approach to gain something they value, eg, to modify their rights/obligations or to clarify their position. In this situation even if the defendant is found to have exerted an improper pressure, it may not be regarded as operative.³⁷

More problematic is the situation where, from the plaintiff's perspective, the variation results in a less advantageous contract. It is tempting to assume that as the plaintiff would have preferred not to enter into the variation, that they must have done so against their wishes and that, consequently, the pressure must have been the cause. But even though the defendant's pressure may be the impetus for the plaintiff reconsidering their position, a court may conclude that the pressure was not causative. *Pao On v Lau Yiu Long*,³⁸ for example, illustrates that the court may conclude that the plaintiff's agreement was the result of their rational decision that completion of a less advantageous contract was still better than having to sue the defendant for breach of contract.

³⁵ Above n 2. See text to notes 135-136 and 143-144.

³⁶ *Haines v Carter* [2001] 2 NZLR 167 (CA). The "defendant" claimed that he entered into a property agreement as a result of the plaintiff's threat to inform the tax department as to his dealings. Despite this claim the defendant was only seeking to set aside parts of the agreement and the Court of Appeal held that this constituted an affirmation.

³⁷ *Moyes & Groves Ltd v Radiation New Zealand Ltd* [1982] 1 NZLR 368 (CA). *XS Racing & Even Marketing Limited v Sunseeker Europe Ag & Co KG* [2005] EWHC 3023 at [32].

³⁸ Above n 2. There agreement to the variation was prompted by commercial considerations associated with a fear of loss of confidence in their company, delay associated with litigation, and the belief that the variation would not be prejudicial to it.

5. Summary

To summarise so far, the recognition that economic pressure may constitute duress has required flow-on developments to the doctrine of duress. Whether the pressure is improper or not can no longer be determined by resort to an external legal reference point such as the criminal law and the law of torts. And because the pressure is less clearly improper, issues of causation and commercial certainty play a more prominent role.

The general statement of principle reflects the resulting developments to the doctrine and provides an accurate indication of the judicial approach when determining a claim of duress. But the general principle is expressed at a high level of abstraction. As such, important nuances in the case law can be overlooked. This paper now turns to bridging the gap between the general statement of principle and the specific considerations, which influence the court.

III. Bridging the Gap Between the General Principle and Results in Particular Cases

1. *An Intermediary Layer of Analysis*

As a first stage in bridging this gap, an analysis of New Zealand case law (supported by English and Commonwealth case law) reveals an intermediary layer of analysis between the general principle and the results in particular cases. It is submitted that this provides more meaningful guidance in determining and then analysing the “distinctive features” of a particular fact situation than that offered by the general principle. It also provides a framework against which specific considerations in individual cases can be generalised.

The intermediary layer of analysis suggests that the courts will set aside a contract for duress when they are satisfied, in broad terms, that the defendant has brought improper pressure to bear on the plaintiff, to make him agree to enter into the contract with the defendant. Before doing so, they will enquire:

1. whether the pressure can be described as “improper” in these circumstances;
2. whether there is a prior relationship between the plaintiff and the defendant;
3. whether the defendant’s motivation in exerting the pressure can be described as “improper” in these circumstances,
4. whether the outcome is inappropriate, either because the contract is intrinsically unfair, or because it is not something which should have been procured by these means; and
5. whether the plaintiff felt sufficiently pressured to enter into a contract which he or she might not otherwise have entered into.

Three further general points may be added. The first is that enquiries 2, 3, and 4 (if necessary) supplement enquiry 1 in the overall task of

determining if the pressure was improper.

The second point is that while all five enquiries will sometimes be taken as distinct questions, they are intertwined,³⁹ so that the result of one enquiry can affect what the court will look for as it goes on to the other enquiries. Thus, for example, the more improper the pressure is (or the more inappropriate the outcome is), the easier it is to persuade the court that the plaintiff was sufficiently pressured to enter into the contract.

The final point is a reminder that the results to enquiries 2, 3 and 4 may not be consistent in their own evaluation of the pressure. In this situation the courts appear to place more emphasis upon enquiry 4, but otherwise undertake a holist evaluation.

We turn now to each of these enquiries.

2. Enquiry One: Is the Pressure Improper?

The pressure scale

As is recognised in the general principle, the nature of the pressure is a key consideration in determining whether it is improper. Pressures are not equal – either in their “persuasive” affect or in the degree to which they can be viewed as improper. Nevertheless, it is possible to identify a scale of types of pressure. The respective ranking of three different groups of pressure can be located upon this scale.

In descending order of ease to establish that the pressure was improper, these groups are: (i) pressures infringing the criminal law; (ii) pressures contravening public policy; and (iii) economic pressures. In turn, pressures coming within these groups can be further divided into sub-groups. When evaluating the use of a particular pressure, its location upon this scale indicates the initial presumptive strength of the plaintiff’s claim. If required, enquiries 2, 3 and 4 then assist the court to evaluate the pressure.

Topping the scale: pressures infringing the criminal law

Not surprisingly, at the top of the scale are acts of personal violence and threats thereof. Such pressures are clearly improper, irrespective of the parties’ relationship (enquiry 2) or the defendant’s motivation (enquiry 3). Moreover public policy against the use of violence is so strong that, despite observations that duress should not be lightly found,⁴⁰ it is relatively easier for the plaintiff to satisfy the court that the outcome of the exercise of this pressure was inappropriate (enquiry 4) and that, as a result, he was sufficiently pressured to enter the contract (enquiry 5). *Barton v Armstrong*⁴¹ illustrates the courts response to these pressures.

There the Privy Council suggests that once the plaintiff shows that a threat of violence was made, the defendant must prove that the threat

³⁹ *Adam Opel GmbH v Mitras Automotove UK Ltd* above n 6, at [26].

⁴⁰ *Kim v Park* HC Auckland CP 250/01, 11 December 2002.

⁴¹ [1976] AC 104.

had not been “a reason” for the plaintiff’s entry into the contract.⁴² Additionally *Barton v Armstrong* suggests that the courts are less sympathetic to the defendant’s claim that the plaintiff should have acted earlier to avoid the contract.⁴³

Cases involving violence display another example of the intertwining of the enquiries. The fact that the court regards the resulting contract as intrinsically unfair (and therefore an inappropriate outcome) is of evidentiary significance – both as to the existence of the pressure and its causative significance – in discharging the plaintiff’s initial onus of proof. In *Kim v Park*,⁴⁴ for example, the plaintiff claimed that he agreed to a variation because of threats of violence. In evaluating this claim the Court was influenced by the fact that pursuant to the agreement the plaintiff had agreed to repay some \$125,000 more than the approximately \$101,000 debt he owed to the defendant. The Court described the agreement as “seriously unfair”.⁴⁵

The end result – a defendant seeking to uphold a contract in the face of a claim by the plaintiff that they entered into it because of the defendant’s violence or threat thereof is pretty much reliant upon persuading the court that there was no violence or threat thereof.⁴⁶

Still remaining within the province of the criminal law, but less clearly an improper pressure, is the threat to instigate criminal prosecution – a subset of the blackmail cases. These threats “ha[ve] generally been regarded as improper”,⁴⁷ but in practice the courts have developed a number of distinctions to determine whether observations surrounding the laying of a complaint of criminal conduct against the plaintiff constitutes blackmail and an improper pressure. An initial distinction is between a threat to lay a complaint and a “warning of consequences”⁴⁸ if a complaint is laid. Assuming a threat, some courts require evidence that the defendant promised to stifle any resulting prosecution.⁴⁹ Other influential matters are whether the threat was made with respect to the actions of another,⁵⁰ and whether the threat was used to gain an

⁴² In *Barton v Armstrong*, *ibid*, there were two reasons why the plaintiff agreed to pay a premium price for the defendant’s shares in a financially distressed company. These were the defendant’s threat of violence, and the plaintiff’s belief that the company’s difficulties could be resolved.

⁴³ In *Barton v Armstrong*, *ibid*, there was a delay of almost one year between the entered into the deed of purchase (17/1/1967) and the challenge to its validity (10/1/1968).

⁴⁴ Above n 40.

⁴⁵ *Ibid*, at [52]. *Barton v Armstrong*, above n 41.

⁴⁶ *Hobbs v Gilbert* HC Nelson CIV-1999-442-2, 21 September 2004. Dispute between a financial adviser and investment company. The Court doubted whether threats of personal violence had been made as alleged.

⁴⁷ *Pharmacy Care Systems Ltd v Attorney-General* above n 2.

⁴⁸ *Beatson, Duress*, above note 3, at 118.

⁴⁹ *Flower v Sadler* (1882) 10 QBD 572, 573 per Lord Coleridge CJ, and at 575 per Brett LJ. See generally *Goff and Jones*, above n 21, at [10-009].

⁵⁰ *Williams v Bayley* (1866) LR 1 HL 200. Threat directed to a member of the

advantage in an unrelated matter.⁵¹

As occurs with threats of personal violence, a conclusion that the defendant's threat constituted an offence should lead to a finding that the threat constituted an improper pressure. The criminal nature of the threat should also dispose a court to a finding that the plaintiff felt sufficiently pressured (enquiry 5) but, since the threat if carried out leads to court proceedings in which the plaintiff can defend themselves, a court may conclude that the threat wasn't causative.⁵²

Descending the scale: pressures contravening public policy

This group comprises two main sub-groups. The first sub-group comprises the straightforward duress of goods case where the refusal to return the plaintiff's goods constitutes a tortious act. The second sub-group comprises demands *colore officii*, eg, those cases in which the defendant is under a public duty to provide certain goods or services but refuses to do so except on certain terms.

This group of pressures is ranked below the earlier group (pressures infringing the criminal law) to reflect that they do not attract the same policy considerations requiring that they be classified as improper. Consequently the circumstance in which the threat occurs plays a more prominent role in determining whether the general law of the land classifies the pressure as improper. This is displayed by the duress of goods cases.

These cases are of further interest, for, as was noted earlier, a threat to retain the plaintiff's property when the defendant does not have the right to possess those goods is one of the traditional forms of duress.⁵³ But the threat may also involve economic pressure and disputed claims over the parties' obligations. This arises when the defendant has possession of the goods pursuant to a contract and is refusing to return them because of an underlying dispute as the parties' contractual obligations. Indeed, where the threat is made in the context of a prior contractual relationship with a view to contractual renegotiation, the courts seem more reluctant to classify the threat as improper.⁵⁴

This reinforces the importance courts place upon the circumstance in which the threat is made. But it also reveals that some duress of goods cases bridge the gap between the traditional approach in which pressures come within recognised "types" and the modern approach evidenced by the general statement of principle. For this reason some of these cases may be seen as coming within the next group.

plaintiff's family. Discussed in *Goff and Jones*, *ibid*, at [10-010].

⁵¹ *Haines v Carter* above n 36.

⁵² *Pharmacy Care Systems Ltd v Attorney-General* above n 2, at [104]. 'Plaintiff' received legal advice questioning the 'defendant's claim that the plaintiff had committed an offence.

⁵³ See text to notes 24-26.

⁵⁴ *Mann v Buxton*, above n 24.

Descending the scale further: economic pressures

Not surprisingly, economic pressures comprise the last group on this scale. This ranking reflects the fact that, as its starting point, the general law of the land does not view economic pressure as being automatically improper. In this respect economic pressures are the opposite to acts (or threats) of violence. The point is that the initial identification of the pressure is largely irrelevant; whether the pressure is improper turns on the answers to enquiries 2, 3 and 4 (the parties relationship, the defendant's motives, and the appropriateness of the outcome).

Economic pressures take many forms. Included within this group are threats not to perform an existing contract, threats to commence civil litigation, and threats to exercise a prerogative the defendant has, such as not to enter into a contract on those terms or withdraw a privilege which the plaintiff enjoys but has no entitlement to, eg, "lawful-act" duress.

The contractual variation situation encompasses the first sub-group. It is tempting to assume that a deliberate breach of contract (or threat thereof) will constitute improper pressure⁵⁵ but the case law shows that this is not the case.⁵⁶ Nevertheless a breach of contract is more serious than say a threat to commence civil litigation, hence the relative ranking of this sub-group. The refusal to perform the contract may be manifested in a number of ways, eg, refusal to settle an agreement for sale and purchase of land, refusal to release goods the subject of the contract, refusal to supply goods or services the subject of the contract, refusal to make a payment required by the contract. Within these examples, case law suggests that a court is more likely to find a refusal to settle the agreement as improper⁵⁷ and less likely to do so with respect to a refusal to make a payment.⁵⁸

Threats to invoke the civil legal process are ranked next, followed by lawful-act duress. This reflects the difficulty of persuading a court to evaluate a lawful act as improper. While the courts have recognised

⁵⁵ *McIntyre v Nemesis DBK Ltd*, above n 2, at [31].

⁵⁶ *Churchill Group Holdings Ltd v Abel* (1989) 4 NZCLC 64,830 (HC). Purchaser refusing to settle purchase of commercial building acquired as an investment property unless vendor entered into a lease agreement; the purchaser claiming that the vendor's agents had represented that the building would be tenanted.

⁵⁷ *Knutson v The Bourkes Syndicate* [1941] SCR 419, (SCC). Vendor refusing to settle unless purchaser assumed responsibility for discharging an encumbrance; *In re Hooper & Grass' Contract* [1949] VLR 269 (SC). Vendor refusing to settle unless purchaser agreed with their apportionment of a statutory irrigation charge; cf *Churchill Group Holdings Ltd v Abel*, above n 56.

⁵⁸ *AE McDonald Ltd v Adams* (1985) 1 NZBLC 102,208, (HC) ("promise of prompt cash in the hand ... is a common enough factor in bargaining situations" at 102,214 (Eichelbaum J)); *Pharmacy Care Systems Ltd v Attorney-General*, above n 2 (withholding of funds is common in civil disputes, at [107])

that the category exists,⁵⁹ there is little detailed consideration of when a threat to do a lawful act will constitute duress.

3. Enquiry Two: What is the Nature of the Parties' Relationship?

Overview

This enquiry is closely associated with enquiry 3 (the defendant's motives) and enquiry 4 (whether the outcome was inappropriate). In all three enquiries, the judicial attention changes from types of pressures *per se* to the exercise of a particular pressure in the circumstances before the court. The importance of these enquiries increases as the pressure descends the scale of improper pressures. The collective aim is to determine whether the use of a (potentially improper) pressure in those circumstances was improper.

Enquiry 2 focuses upon the parties' relationship. The key message is that the parties' relationship colours the court's impression of the defendant's pressure. Pressures that may properly be used against a stranger may become improper when the parties are in a more complex relationship. This is because the parties' relationship may make the plaintiff dependent upon the defendant or particularly vulnerable to the defendant's pressure.⁶⁰ By enquiring as to the defendant's motives, enquiry 3 builds upon the concern that the relationship may have been exploited. Of course an inappropriate outcome (enquiry 4) may be of evidentiary significance as indicating that the defendant did exploit the parties' relationship.

The importance of the parties' relationship as "a factor relevant to duress" was recognised by Tipping J in *Attorney-General for England and Wales v R*.⁶¹ As was noted earlier, its importance is displayed with duress of goods. The courts are more reluctant to conclude that a threat to retain the goods is improper when the parties are in a contractual relationship and there is a dispute as to whether the plaintiff has the immediate right to possess the goods.⁶² Similarly the courts evaluation of a threat to commence litigation is influenced by the nature of the parties' relationship. As the relationship becomes more complicated there is a

⁵⁹ *CTN Cash and Carry Ltd v Gallaher Ltd*, above n 2; *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 at 345 (HC); *Attorney-General for England and Wales v R* [2003] UKPC 22; [2004] 2 NZLR 577 at [16].

⁶⁰ Through the relationship the defendant may learn of pressures that the plaintiff is particularly vulnerable to. See *Carillion Construction Limited v Felix (UK) Limited* [2001] BLR 1. Felix, a subcontractor to Carillion, was responsible for supplying exterior cladding units. The parties disagreed over some of Felix's charges and Felix threatened to withhold deliveries. The threat was made at a time when Felix knew that other tradespeople were dependent on their supply of these units, and that Carillion was becoming concerned as to the delays, at [39]. See also *Adam Opel GmbH v Mitras Automotove UK Ltd* above n 6, (discussed in text to notes 146-149).

⁶¹ Above n 9, at [68] per Tipping J.

⁶² See text to notes 24-26.

corresponding increase in scope for legitimate disagreement between the parties as to their respective rights and infringement of those rights.

The spectrum of relationships

Relationships differ. At one end of the spectrum are people who lack a close prior relationship and have no reason to expect any more than that each will observe the general law of the land. It is here that the traditional types of pressures are to be found, for example threats of personal violence, blackmail. Threats to seize or withhold the plaintiff's property unrelated to any contractual dispute also arise here. Alternatively economic pressure is likely to be seen as everyday commercial pressure and, as such, proper.

At the other end of the spectrum, we find people who are in such a relationship of reliance and trust that the law implies a duty to act in good faith, even a duty of loyalty. Franchise agreements and the like illustrate the circumstances when duties of this type are implied.⁶³

Bordering this situation are people who are so closely related to each other that they rely on a contract, or some similar commercial arrangement, to regulate matters between them. There is a 'prior' contractual relationship in the sense that a contract exists at the time that the defendant puts pressure on the plaintiff to make a new contract. Often the plaintiff will be required to give up advantages that he was entitled to under the pre-existing relationship. This is the context in which the contractual variation situation arises. It is considered more deeply in the next subsection.

In between are other relationships, for example those involving employer and employee,⁶⁴ those involving agents of the crown and the crown,⁶⁵ and those who have close personal relations, for example by reason of family connection,⁶⁶ or one of them being a trusted advisor of the other.⁶⁷

⁶³ US law provides an interesting comparison to Anglo-New Zealand law in respect of both the willingness to impose a duty of good faith and fair dealing in the performance of a contract and the express recognition that a breach of this duty constituted an improper threat for the doctrine of duress. The Restatement (Second) of Contracts, s 205, is representative of the US position. This imposes upon the parties to a contract a duty of good faith and fair dealing in the performance of the contract and its enforcement. See also § 176(1)(d) which provides that a threat is improper if it is a breach of this duty.

⁶⁴ *Hepworth Heating Ltd v Akers* EAT/13/02/MAA EAT/846/02/MAA 21 January 2003; 2003 WL 21047510.

⁶⁵ *Attorney-General for England and Wales v R*, above n 59, (Soldier serving in an elite unit).

⁶⁶ See *Shea v Ward* (2001) 20 FRNZ 662 (CA). Property dispute between former defacto partners, allegation of a threat to lay a complaint of assault: *Haines v Carter* above n 36.

⁶⁷ Certainly such relationships do sometimes appear in cases of duress, compounding the difficulties that a plaintiff will have faced in dealing

Contractual relationships

*Atlas Express Ltd v Kafco (Importers and Distributors) Ltd*⁶⁸ illustrates that an existing contractual relationship is an important factor in evaluating the defendant's pressure. Atlas had contracted to deliver Kafco's products for a certain price. Subsequently Atlas discovered that it had miscalculated the price and refused to make future deliveries unless Kafco agreed to a price increase. The new price may have been fair, but the court concluded that Atlas should not have obtained the price increase by that threat. Through the relationship Atlas knew that Kafco was particularly vulnerable to its threat, in particular it knew that the deliveries were "essential" for both Kafco's "success" and its "commercial survival",⁶⁹ and that it "would have been difficult, if not impossible [for Kafco]... to find alternative carriers in time to meet their delivery dates."⁷⁰

Another illustration involves a refusal to enter into a contract with the plaintiff except on the defendant's terms. This refusal is more acceptable behaviour when the parties are strangers. This is because the parties are assumed to be able to look after their own interests. Moreover, typically there is a market-place of willing buyers and sellers. This provides a medium, through which the parties are free to seek alternative contractual partners and, consequently, a means by which to evaluate the reasonableness of the refusal to contract.⁷¹

In contrast, the refusal seems less acceptable when the parties are in an existing commercial relationship, the plaintiff has detrimentally relied upon the defendant's encouragement of the continuation of that relationship and then, at a time when the plaintiff is unable to seek an alternative contractual partner, is confronted by the defendant's refusal.⁷²

In the absence of evidence of exploitation of the relationship, however, *Smith v William Charlick Limited*⁷³ illustrates that the mere existence of

with the defendant's threats. But generally these situations will tend to be governed by the law of fiduciary duty and undue influence.

⁶⁸ [1989] 3 WLR 389 (QB). See also *Carillion Construction Limited v Felix (UK) Limited* [2001] BLR 1; and *Adam Opel GmbH v Mitras Automotove UK Ltd* above n 6.

⁶⁹ Ibid, at 392 (per Tucker J).

⁷⁰ Ibid.

⁷¹ See *East Coast Gas Supply Limited v Louis Wood & Sons Limited* HC Napier CP 101/88, 10 November 1988. East Coast Gas had offered to contribute to the cost of a gas line if Lewis Wood agreed to purchase a certain quantity of gas for use in its business operations. A subsequent fire in Lewis Wood's factory placed some pressure on it to decide whether to move to gas, which it did. Some time later Lewis Wood sold the business but remained bound to acquire the specified quantity of gas. The Court held there was no duress.

⁷² See Restatement (Second) of Contracts, §176, cmt f, Ill 13.

⁷³ (1923-1924) 34 CLR 38 (HC Australia). See also *Pharmacy Care Systems Ltd v Attorney-General*, above n 2. The Court found that the employee making the threat did not have authority to do so.

a relationship does not mean that a refusal to contract is automatically improper.

There the South Australian Wheat Harvest Board, the sole seller of wheat in South Australia pursuant to a statutory scheme, threatened to cease the supply of wheat to William Charlick Limited – a milling company. The Board acted as the agents of wheat growers and sold wheat on a weekly basis. The Board had sought to ensure that each miller received just enough wheat for its immediate needs, but William Charlick was able to create a stockpile. The Board increased the price of wheat payable to the growers thereby increasing the price of milled wheat. This enabled William Charlick to make extra profits from the stockpiled wheat. The Board believed that this constituted an improper windfall for William Charlick and refused to sell it any more wheat unless it paid over to the Board the extra profit from the stockpile; the Board intended to pass this on to the growers. The High Court of Australia held that in these circumstances this pressure was proper.

4. Enquiry Three: What was the Defendant's Motivation in Exerting the Pressure?

Pressure may be exerted for a range of reasons. The case law reveals that courts are influenced by the defendant's motives, in particular why they sought that benefit from the plaintiff. As Lord Atkin observed in *Thorne v Motor Trade Association*,⁷⁴ what the blackmailer "has to justify is not the threat, but the demand of money."⁷⁵ The case law reveals a scale of judicial acceptance of the defendant's motives. To this we now turn, considering the various motives in descending order of judicial approval.

The defendant is responding to a genuine commercial dispute

At the approval end of the scale is the situation where the parties are involved in a genuine commercial dispute as to the performance of the contract. Perhaps the strongest example of a genuine dispute is when the dispute arises from an external source for which neither party is responsible for (or are both equally responsible for), and neither party has assumed the risk of that event occurring.

This situation is illustrated by *Moyes & Groves Ltd v Radiation New Zealand Ltd*.⁷⁶ This case involved a variation of a contract to supply certain parts.⁷⁷ These goods were to be manufactured in India to the buyer's specifications. For some reason manufacture was delayed by about two years. And because of personnel changes in both parties the order was "overlooked".⁷⁸ When the goods finally arrived their price had increased as a result of increased costs in India. The importer/seller

⁷⁴ [1937] AC 797.

⁷⁵ Ibid, at 806.

⁷⁶ Above n 37.

⁷⁷ Ibid, at 371 (per Cooke J).

⁷⁸ Ibid.

offered to sell the goods at cost price or to return them to India. The buyer agreed to buy, albeit under protest. The Court of Appeal held that there was a genuine disagreement between the parties,⁷⁹ that it had no doubt as to bona fides of the importer;⁸⁰ and that the parties had agreed to "a prudent and sensible compromise of a difference on which there was much to be said on both sides".⁸¹

*McIntyre v Nemesis DBK Ltd*⁸² provides another illustration, albeit here the court's evaluation of the defendant's motives was "finely balanced".⁸³ This case involved the variation of a joint venture land development agreement; the variation resulted in an increase in the remuneration payable to the joint venture party (the defendant) responsible for managing the development. The claim for increased remuneration was made following considerable delays (and increased work) in the development arising from disputes with the local Council over planning and consent issues. While the defendant was "forceful"⁸⁴ in its demands, suggesting that otherwise it would discontinue managing the development, the joint venture agreement provided for management changes and the Court saw the defendant as being motivated to "initiat[ing] a process aimed at agreeing" to such a change.⁸⁵

The defendant is responding to the plaintiff's breach of contract

A genuine commercial dispute may also arise out of the parties' performance of the contract. For example the defendant may allege that the plaintiff is not performing their contractual obligations and, as its price for continuing with that relationship, seek a variation. But disputes can be manufactured. Additionally the defendant (whether acting in good faith or not) may take an objectively unreasonable interpretation of the contract.

One judicial response is to determine whether the plaintiff was in breach. *Walmsley v Christchurch City Council*⁸⁶ is an example. Walmsley produced a souvenir programme for the Council. The programme was to be sold at an air show and Walmsley was to receive a share of the proceeds. Claiming that the programme contained too many typographical and grammatical errors, the Council demanded that it be corrected and engaged another printer. The parties entered into a new contract pursuant to which Walmsley agreed to pay the cost of re-printing and the Council guaranteed a certain level of sales. The Court upheld the agreement. In so doing it considered that Walmsley had breached its obligations and this justified the Council's own threat to

⁷⁹ Ibid, at 373 (per Somers J).

⁸⁰ Ibid, at 371 (per Cooke J).

⁸¹ Ibid, at 372 (per Cooke J).

⁸² Above n 2.

⁸³ Ibid, at [61].

⁸⁴ Ibid.

⁸⁵ Ibid, at [55].

⁸⁶ [1990] 1 NZLR 199 (HC).

reject the programme.⁸⁷

To anticipate the inter-relationship of this enquiry with enquiry 4 (the appropriateness of the outcome) a defendant may attempt to exploit the plaintiff's breach so as to gain a benefit. *Walmsley v Christchurch City Council* is of further interest as illustrating the Court's consideration of the merits of the variation obtained by the defendant. It concluded that the new agreement "was to its [Walmsley's] advantage"⁸⁸ and his consent "was a genuine recognition of the situation".⁸⁹

The defendant is responding to what it believes is the plaintiff's breach of contract

Many courts do not consider if there was a breach. For them a genuine dispute is established if the defendant believed that he had an "arguable case"⁹⁰ that the plaintiff was in breach. The point is that a genuine dispute may exist despite a later finding that the plaintiff was not in breach. This is illustrated by *AE McDonald Ltd v Adams*.⁹¹

Adams employed AE McDonald Ltd (McDonald) to undertake earthmoving works. McDonald were to be paid on an hourly rate but it had given, what Adams believed, to be an estimate of the total price. The cost of the earthworks increased beyond this figure and Adams refused to make final payment of the balance of the account, unless and until the total amount was reduced. Associated with this was the threat of prolonged and expensive litigation. At the time McDonald was in some financial difficulties but the court found that there was no evidence that Adams used this to coerce a settlement or take advantage of McDonald.⁹² A compromise agreement was reached between the parties and after Adams had made the requisite payments McDonald claimed duress. Adams was unable to establish that the estimate was binding on McDonald⁹³ so that its account was a breach by McDonald. Nevertheless the court upheld the compromise; Adams' "bona fide belief ... that they had good grounds for arguing that ... [McDonald] right of recovery was limited"⁹⁴ was enough.

Care must be taken with this quotation as courts reserve the right to evaluate the defendant's bona fides and, in so doing consider whether their belief is reasonable.⁹⁵ Moreover a bona fide belief of the plaintiff's breach is not in itself enough to support the classification of a pressure as proper;⁹⁶ enquiry 4 (the outcome) is also relevant. In *AE McDonald Ltd v*

⁸⁷ Ibid, at 208.

⁸⁸ Ibid.

⁸⁹ Ibid, at 209.

⁹⁰ *Huyton SA v Peter Cremer GmbH & Co*, above n 5, at 637 (per Mance J).

⁹¹ Above n 58. See also *Churchill Group Holdings Ltd v Abel*, above n 56.

⁹² Ibid, at 102,214.

⁹³ Ibid, at 102,210.

⁹⁴ Ibid, at 102,213, and 102,215.

⁹⁵ *Adam Opel GmbH v Mitras Automotove UK Ltd* [2007] above n 6, at [34].

See also *Couch v Branch Investments (1969) Ltd* [1980] 2 NZLR 314 (CA).

⁹⁶ *Huyton SA v Peter Cremer GmbH & Co* above n 5, at 637 (per Mance J).

*Adams*⁹⁷ the Court appears to regard the compromise as an appropriate one.⁹⁸ One thing is clear; a lack of bona fides is fatal.⁹⁹

The defendant feels honour-bound to respond to the plaintiff's actions

A common feature with the previous two situations is that the defendant is affected by the plaintiff's breach (or arguable breach) and, motivated by commercial self-interest, seeks to remedy this.

A variation on this arises when the defendant feels either morally or legally required to intervene. A key factor in *Smith v William Charlick Limited*¹⁰⁰ appears to be that the Board felt honour bound to the growers to respond to what it regarded as inappropriate behaviour by William Charlick in gaining a windfall profit.

*Pharmacy Care Systems Ltd v Attorney-General*¹⁰¹ is similar. It involved the purchase of pharmaceuticals by a state funded purchasing authority. The authority discovered that the seller was supplying and charging for recycled pharmaceuticals and pharmaceuticals given to it by its suppliers. It believed that this was a breach and considered that it was required to demand the cessation of this practice and a refund. The Authority was the seller's sole customer and it exerted various pressures upon the seller to achieve this including withholding payments and threatening to refer the matter to the police. Additionally one of the authority's employees exceeded their authority by (in essence) threatening to cease to deal with the supplier.¹⁰² The Court of Appeal found there was no duress.¹⁰³

The defendant seeks to remedy a poor contract

Sometimes the defendant's motivation is the realisation that they made a bad bargain and a wish to renegotiate it.¹⁰⁴ This was the situation in *Pao On v Lau Yiu Long*¹⁰⁵ and in *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd*.¹⁰⁶ A variation on this is when some external event occurs, the risk of which the contract assigns to the defendant, but following the occurrence of the event, they do not wish to bear. Examples include the risk of striking workers in *B & S Contracts and Design Ltd v*

⁹⁷ Above n 58.

⁹⁸ Ibid, at 102,214.

⁹⁹ *Huyton SA v Peter Cremer GmbH & Co*, above n 5, at 637 (per Mance J).
¹⁰⁰ (1923-1924) 34 CLR 38, (HC Australia).

¹⁰¹ Above n 2.

¹⁰² Ibid, at [106].

¹⁰³ The Supreme Court declined the seller's application for leave to appeal on the basis that the appeal "would fail on the facts as found by the Courts below", see *Pharmacy Care Systems Limited v Attorney-General* (2004) 17 PRNZ 308, at [3].

¹⁰⁴ *Peter Kiewit Sons' Co v Eakins Construction Ltd* [1960] SCR 361 (SCC) illustrates the difficulties in distinguishing these two situations. There the majority concluded that at the most the defendant was "close to being forced to abandon the contract owing to the pressing claims of creditors" at 365 (Judson J delivering the minority's judgment).

¹⁰⁵ Above n 2.

¹⁰⁶ Above n 68.

*Victor Green Publications*¹⁰⁷ and the risk of currency devaluation in the 'Atlantic Baron'.¹⁰⁸

Bad bargain making is an inherent contractual risk and, not-surprisingly, these cases show that this motivation attracts judicial disapproval. Nevertheless, the different results in *Pao On v Lau Yiu Long* and the *Atlantic Baron* as opposed to *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* and *B & S Contracts and Design Ltd v Victor Green Publications* illustrate that even motivations which warrant judicial censure may not pressure the plaintiff to such degree to enter into a contract of which they might not otherwise have entered into (enquiry 5).

The defendant seeks to ensure its commercial survival

This is a variation on the preceding poor contract situation. Occasionally, the defendant's bargain is so bad (or supervening events make it so) that a variation is needed to ensure the defendant's commercial survival and, consequently, their completion of the contract. In this situation the plaintiff's agreement to the variation is more likely to be as a result of its rational decision that completion of the contract is in its best interests. *Williams v Roffey Bros & Nicholls (Contractors) Ltd*¹⁰⁹ illustrates this type of situation and shows that courts look favourably on upholding the resulting variation. In that case a third party advised the plaintiff of the defendant's financial position, but the involvement of a third party should not be required or be decisive.

As occurs with the criminal prosecution cases a key factor may be whether the advice is seen as a warning of consequences as opposed to a threat. Indeed, in *McIntyre v Nemesis DBK Ltd*¹¹⁰ the Court of Appeal expressly recognised that the courts are alive to the situation "[w]here one party warns the other that, as a matter of commercial reality, it will not be able to perform its contractual obligations unless changes are agreed to" and warned that "care must be taken to distinguish between ... threats [to breach a contract] and ... warnings [that the party is unable to perform its contract]".¹¹¹

The defendant is seeking to exploit the plaintiff's vulnerability so as to obtain a windfall

The strongest judicial disapproval seems reserved to these situations. *D & C Builders Ltd v Rees*¹¹² provides an example. *D & C Builders Ltd*

¹⁰⁷ [1984] ICR 419.

¹⁰⁸ *North Ocean Shipping Co Ltd v Hyundai Co Ltd* [1979] 3 WLR 419.

¹⁰⁹ Above n 4. There a sub-contractor got into financial difficulties because the contract price was too low and there was a concern whether the sub-contractor would not be able to complete the contract on time, thereby exposing the head contractor to a time penalty.

¹¹⁰ Above n 2.

¹¹¹ *Ibid*, at [32]

¹¹² [1966] 2 QB 617. See also *PAC Limited v Hamilton Heritage Limited*, above n 5.

provided building services to the Rees. Aware that the company was in financial difficulties, the Rees, to quote Lord Denning MR, “behaved very badly”.¹¹³ They offered part-payment in settlement of their account, threatening that, if the offer was rejected, they would pay nothing. They also misrepresented their own financial position.¹¹⁴ The company agreed but later successfully challenged the validity of their agreement.

*Universe Tankships Inc of Monrovia v International Transport Workers Federation*¹¹⁵ is another example. There a ship-owner was financially dependent upon the continued use of its ship. Aware of this a trade union threatened to “black” the ship unless it received a contribution to its welfare fund.¹¹⁶ The House of Lords held that the ship-owner had been subjected to economic duress.

5. Enquiry Four: Was the Outcome Inappropriate?

The term “outcome” refers to what the defendant achieved through the exertion of their pressure. This enquiry is directed at two different forms of inappropriate outcomes – first, outcomes that should not have been procured by the pressure used, and second, intrinsically unfair outcomes

An outcome that should not have been procured by the pressure

This form of inappropriate outcome is perhaps the more straightforward of the two to justify while, perhaps, the harder to find. The justification is that some pressures (eg, violence) are not to be used, while other pressures may not be used to achieve some outcomes.¹¹⁷ So, for example, a threat of non-performance of a contract with the aim of responding to the plaintiff’s breach or arguable breach may be appropriate. Alternatively, the same threat made with the aim of obtaining an unrelated benefit or windfall would appear to be inappropriate.¹¹⁸

This category of pressures may explain the result in *re Hooper & Grass’ Contract*.¹¹⁹ The parties had entered an unconditional agreement for sale and purchase of land. Prior to settlement a disagreement arose over apportioning an irrigation charge. Ultimately the vendor’s solicitor refused to settle unless his approach was adopted. The purchaser settled making the required payment. The court concluded that payment was paid under duress as the vendor was “threatening to withhold that to

¹¹³ Ibid, at 626.

¹¹⁴ Ibid.

¹¹⁵ Above n 2.

¹¹⁶ Ibid, at 383.

¹¹⁷ *Jones v Morgan* [2001] EWCA Civ 995, [2001] Lloyd’s Rep Bank 323, at [48] per Chadwick LJ (Mortgagee has a “proper interest” in being repaid monies owed to him and therefore is entitled to threaten to exercise a power of sale).

¹¹⁸ *Adam Opel GmbH Mitras Automotove UK Ltd* above n 6. See text to notes 146-149 for a discussion of this case.

¹¹⁹ [1949] VLR 269. See also *Knutson v The Bourkes Syndicate* [1941] SCR 419 (SCC).

which the other party was legally entitled".¹²⁰ The point is that while a threat not to settle may be appropriate when there is a fundamental dispute between the parties, for example involving the nature or qualities of the property,¹²¹ it is inappropriate when the dispute is of a secondary nature and there are more suitable means of resolving it.

*D & C Builders Ltd v Rees*¹²² suggests that threats of non-payment may also produce an inappropriate outcome when the defendant is exploiting the plaintiff's financial difficulties in order to obtain a windfall. What distinguishes this situation from the genuine dispute in which the promise of prompt payment is used as an inducement to settle (associated with the implicit threat not to otherwise pay) is the exploitation of the circumstances; in essence the effectiveness of the pressure is knowingly leveraged.¹²³

An intrinsically unfair outcome

For some, the suggestion that the outcome is relevant may be controversial. This is because an evaluation of the fairness of the contract is not seen as either part of the province of the law of contract nor one for which it is equipped.¹²⁴ Nevertheless, as we have seen,¹²⁵ courts do refer to notions of fairness, or, to use the words of Sir Donald Nicholls V-C in *CTN Cash and Carry Ltd v Gallaher*, courts do evaluate the "overall outcome"¹²⁶ when reviewing the pressure.¹²⁷ This is because an unfair outcome is of evidentiary significance; the outcome requires an explanation and invites enquiry into the parties' relationship and the defendant's motivation to

¹²⁰ Ibid, at 272 (per Fullagar J).

¹²¹ *Churchill Group Holdings Ltd v Abel*, above n 56.

¹²² Above n 112.

¹²³ This case can be compared with *AE McDonald Ltd v Adams* (1985) 1 NZBLC 102,208 and *Churchill Group Holdings Ltd v Abel*, above n 56. In both cases the courts found no evidence that the "defendant" was exploiting the "plaintiff's" financial difficulties.

¹²⁴ Beatson, *Duress*, above n 3, at 110; *Pharmacy Care Systems Ltd v Attorney-General*, above n 2, at [87].

¹²⁵ *D & C Builders Ltd v Rees*, above n 112.

¹²⁶ Above n 2, A key consideration for Sir Donald was the fact that through a threat to withdraw credit facilities (which it was lawfully entitled to do), Gallagher Ltd had received payment from CTN to reimburse it for a loss that it wrongly had believed CTN was liable for. While concluding that CTN's payment had not been obtained by duress Sir Donald observed at 720 that "it does seem to me that prima facie it would be unconscionable for [Gallagher Ltd] to insist on retaining the money".

¹²⁷ See also *PAC Limited v Hamilton Heritage Limited*, above n 16. Hamiltons was employed by PAC to create a "film" set. When filming was complete it was realised that the budget for the total project had been exceeded. PAC was financially able to absorb the loss, but it misrepresented its financial position (suggesting that it might "fold") and sought a reduction in the contract price from all the contractors. In finding that the plaintiff's agreement had been obtained by duress the Court of Appeal noted that the original price "was reasonable" and "known by both parties to be so". The associated inference is that the varied price was not reasonable.

see if the exercise of the pressure in those circumstances was improper. Alternatively, *Moyes & Groves Ltd v Radiation New Zealand Ltd*¹²⁸ illustrates how a prima facie fair outcome supports the conclusion that the parties had reached a sensible compromise. Because of this, this enquiry is a key one for evaluating economic pressures.

6. Enquiry Five: Did the Plaintiff Feel Sufficiently Pressured to Enter into the Contract?

Identifying the judicial concern

As is discussed earlier,¹²⁹ the recognition that economic pressures may be improper introduced a new layer of complexity in evaluating the effect of the pressure upon the plaintiff. It is clear that the courts have had difficulties in responding to this. This explains the different tests individual courts have advanced.

These tests range from the pressure being “a reason”¹³⁰ to requiring that it “vitiates [the plaintiff’s] consent” to the contract.¹³¹ In between these extremes is the idea that the pressure bring “about an absence of practical choice” for the plaintiff.¹³² While this is the phrase used in the statement of the general principle of the doctrine of duress, there is support for a test of “significant cause”.¹³³

The difficulties continue. This is evidenced by the fact that, despite the relaxation in approach evidenced by the statement of general principle, some courts continue to ask whether the plaintiff’s will was “overborne”.¹³⁴ Then there is the continued use by some courts of the factors identified in *Pao On v Lau Yiu Long*¹³⁵ as “material” in determining if there had been “no true consent”. These factors are: whether the plaintiff protested; whether the plaintiff had an alternative course open to him; whether the plaintiff received independent advice; and whether the plaintiff took steps to avoid the contract.¹³⁶

What is particularly interesting about the continued use of these factors is that they fail to provide an accurate indication of the court’s conclusion. The case law shows that neither the presence nor the absence of either a protest or the availability of independent advice is decisive. For example, in *AE McDonald Ltd v Adams*¹³⁷ the significance of the protest was discounted on the basis that “the true test of a reasonable

¹²⁸ Above n 37.

¹²⁹ See text to notes 37-38.

¹³⁰ *Barton v Armstrong* [1976] AC 104.

¹³¹ *Pao On v Lau Yiu Long*, above n 2.

¹³² *Attorney-General for England and Wales v R*, above n 9, at [62] (per Tipping J).

¹³³ See n 16.

¹³⁴ *Pharmacy Care Systems Ltd v Attorney-General*, above n 2, at [89]. *Rouse v Anzon Project No 5 Limited* CA211/90, 30 May 1995.

¹³⁵ Above n 2.

¹³⁶ *Ibid*, at 635.

¹³⁷ Above n 91.

compromise is that neither side so regards it.”¹³⁸ And the absence of a protest can be explained away as indicative of the plaintiff’s acceptance that they had no choice but to agree.¹³⁹

Similarly the absence of independent advice is not fatal and can be discounted in various ways, for example by a finding that the plaintiff did have the opportunity for independent advice¹⁴⁰, that the contract was in the plaintiff’s best interests¹⁴¹ or that the plaintiff was aware of all the options. Alternatively the presence of independent advice does not preclude a finding of duress.¹⁴²

In *Pao On v Lau Yiu Long*,¹⁴³ the Court also suggested that whether the plaintiff had an alternative choice open to him was relevant. This is similar to the enquiry whether the plaintiff had a “practical choice”. But both enquiries really beg the question. What we do know is that a finding of choice, even if that choice is “unpalatable” or “unattractive” often tends to be fatal to the plaintiff’s claim.¹⁴⁴ Yet, it is rare for a plaintiff to have no choice whatsoever. Even a plaintiff threatened with violence has a choice – to go to the police. Nevertheless, in this situation failure to go to the police does not preclude a finding of duress. So the availability of choice does not appear to be the decisive, at least in all situations.

What can be observed is that the existence of choice becomes more significant as the threat becomes palpably less unlawful. But even in this situation the focus is not on the existence of choice per se but upon the appropriateness of the alternative. As Tipping J observed in *Attorney-General for England and Wales v R*, “the nature of any alternatives reasonably open to the plaintiff will be of major importance”.¹⁴⁵

*Adam Opel GmbH v Mitras Automotive UK Ltd*¹⁴⁶ provides a recent English illustration. Mitras supplied a vehicle bumper mount to Opel for use on one of its vans. A facelift to the van’s design meant that the bumper mount was no longer required and Opel gave notice that it would be terminating the supply agreement. Mitras threatened to cease supplies (thereby bringing the assembly line to a halt after approximately one day¹⁴⁷) unless it received an increase in unit price

¹³⁸ Ibid, at 102,215.

¹³⁹ *Universe Tankships Inc of Monrovia v International Transport Workers Federation*, above n 2, at 400 per Lord Scarman.

¹⁴⁰ *AE McDonald Ltd v Adams*, above n 58; *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 at 345.

¹⁴¹ *Rouse v Anzon Project No 5 Limited* CA211/90, 30 May 1995.

¹⁴² *B & S Contracts and Design Ltd v Victor Green Publications* [1984] ICR 419; *PAC Limited v Hamilton Heritage Limited*, above n 16.

¹⁴³ [1980] AC 614.

¹⁴⁴ *Attorney-General for England and Wales v R*, above n 9, at [68]; *Hepworth Heating Ltd v Akers*, above n 64, at [21].

¹⁴⁵ *Attorney-General for England and Wales v R*, above n 9, at [62] (emphasis added). See also *McIntyre v Nemesis DBK Ltd*, above n 2, at [77] (was the alternative a commercially reasonable one?).

¹⁴⁶ Above n 6.

¹⁴⁷ Unbeknown to Opel, one of its employees had been able to increase the

and a compensation payment. Unsuccessful in its application to apply for an injunction *ex parte* Opel agreed. In finding that there was duress the court stressed Opel's "legitimate concern to ensure security of supply"¹⁴⁸ and downplayed the other option suggested as available to it – applying for an injunction *inter parties* – as "worthy of admission to Alice's wonderland".¹⁴⁹

From this review of the cases, what seems to be happening is that a court's conclusion as to causation masks the operation of a number of considerations involving ideas as to the nature of contractual (re) negotiations, which are either omitted or not clearly listed in with the factual summary of the defendant's actions that the plaintiff leads as objectionable. Perhaps the most open statement of the court's approach is contained in *PAC Limited v Hamilton Heritage Limited*.¹⁵⁰ In explaining the 'significant cause' test, Ward LJ, after drawing an analogy with "material influence", suggests that the word "significant" is added:¹⁵¹

to emphasise the need for caution before finding economic duress is established: it emphasises the need to distinguish tough, even ruthless, negotiation which, whilst it may put pressure on a weaker party to capitulate, nevertheless remains permissible, as opposed to the illegitimate pressure which exceeds the bounds of commercial propriety.

Thus when considering choice the courts really are undertaking a final review as to whether the pressure should be classified as improper, in essence, reviewing the totality of enquiries 1 through 4 suggested here. Nevertheless, a key consideration would appear to be whether the court can perceive a legitimate commercial reason for the plaintiff entering into the contract,¹⁵² this has direct links with the courts' evaluation of the contract's appropriateness.

An exception

There is one exception.¹⁵³ The exception arises when the court concludes that the plaintiff's behaviour was such that he should be precluded from challenging the appropriateness of the contract. The plaintiff may be regarded as affirming the contract, for example by failing to "take timely steps" to set aside the contract¹⁵⁴ and/ or by seeking to set aside

holding of bumper mounts to enable 48 hours of production, *ibid*, at [31].

¹⁴⁸ *Ibid*, at [33].

¹⁴⁹ *Ibid*, at [32].

¹⁵⁰ Above n 2.

¹⁵¹ *ibid*.

¹⁵² *Pao On v Lau Yiu Long*, above n 2.

¹⁵³ This was recognised in *Pao On v Lau Yiu Long*, *ibid*, in the fourth of the factors referred to above – "when did the plaintiff take steps to avoid the contract?"

¹⁵⁴ *McIntyre v Nemesis DBK Ltd*, above n 2, at [99]-[100]. In that case approximately 4 years had elapsed between entry into the variation and the raising of the duress claim. Moreover, the claim of duress was raised only after the death of the guiding force in the defendant company.

part only of the contract.¹⁵⁵ Alternatively the court may conclude that the plaintiff is misusing the doctrine of duress.

A plaintiff may attempt to misuse the doctrine by choosing to enter into a contract with the intention of obtaining the defendant's performance before resorting to litigation. Associated with this are subsequent changes of heart by plaintiffs who realise that there were better alternatives open to them. *AE McDonald Ltd v Adams*¹⁵⁶ illustrates both situations.

After agreeing to the compromise with Adams as to the cost of the earthmoving works, and receiving the first of the scheduled payments, McDonald consulted a solicitor and discovered that they could have improved their bargaining position by placing a lien on the Adams land.¹⁵⁷ Rather than seeking to repudiate the agreement at that time, McDonald withheld action until they had received the last of the scheduled payments. As described by the court, McDonald "set about what, put baldly, was a course of deception, designed to secure payment of the next instalment due in terms of the settlement."¹⁵⁸

IV. Conclusion

Claims of economic duress are hard to evaluate, especially in the contractual variation situation. In the end, the result does turn on the courts evaluation of the "distinctive features"¹⁵⁹ of the case rather than a straightforward application of the general principle. This paper has attempted to bridge the gap between the statements of general principle as to what constitute duress and the results in particular cases. Its main contribution is to identify an intermediary layer of analysis – the following five enquiries:

1. whether the pressure can be described as 'improper' in these circumstances;
2. whether there is a prior relationship between the plaintiff and the defendant;
3. whether the defendant's motivation in exerting the pressure can be described as 'improper' in these circumstances;
4. whether the outcome is inappropriate, either because the contract should not have been procured by these means or is intrinsically unfair; and
5. whether the plaintiff felt sufficiently pressured to enter into a contract which he or she might not otherwise have entered into.

In so doing it has shown how the classification of a particular pressure in a particular situation turns on these enquiries. It also shows that these enquiries are intertwined but that they do not necessarily produce

¹⁵⁵ *Haines v Carter*, above n 36.

¹⁵⁶ Above n 58.

¹⁵⁷ *Ibid*, at 102, 212.

¹⁵⁸ *Ibid*, at 102, 215.

¹⁵⁹ *CTN Cash and Carry Ltd v Gallaher Ltd*, above n 2, at 717 (per Steyn LJ).

consistent evaluations, for example a court may have sympathy for the defendant's motivation in exerting the pressure yet ultimately conclude that in those circumstances the pressure was improper. But in the end, the case law suggests that a key consideration is whether the court views the outcome of the pressure as inappropriate.